



STATE BOARD OF OPTOMETRY
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Meeting Minutes
 Tuesday, June 21, 2011
 Junipero Serra Building
 320 W. 4th Street
 7th Floor Conference Room
 Los Angeles, CA 90013

Members Present

Lee Goldstein, OD, MPA
 Board President
 Alejandro Arredondo, OD
 Board Vice President
 Monica Johnson,
 Board Secretary

Fred Naranjo, MBA, Public Member
 Kenneth Lawenda, OD
 Alexander Kim, MBA, Public Member
 Donna Burke, Public Member

Members Absent (Excused)

Edward Rendon, MA, Public Member

Staff Present

Mona Maggio, Executive Officer
 Andrea Ieiva, Policy Analyst
 Jessica Siefertman, Probation Monitor

Michael Santiago, Staff Counsel
 Michelle McCarron, Deputy Attorney General

Guest List

On File

Tuesday

9:00 a.m.

FULL BOARD OPEN SESSION

1. Call to Order – Establishment of a Quorum

Board President, Lee Goldstein, O.D. called the meeting to order at 9:00 a.m.
 Dr. Goldstein called roll and a quorum was established.

2. President's Report

Dr. Goldstein welcomed everyone in attendance. He asked the Board members and members of the public to introduce themselves.

Dr. Goldstein reported on his participation in the monthly Department of Consumer Affairs (DCA) conference call for all health board chairs. The most recent calls have discussed departmental initiatives, budget concerns, legislation and continuing competency. Dr. Goldstein would like the issue of a "Continuing Competency Pilot Program: to be on the agenda for the next State Board meeting. He also has asked Board member, Dr. Alejandro (Alex) Arredondo to participate on behalf of the board on the next departmental call scheduled July 12, 2011, as Dr. Goldstein will not be able to participate that day.

3. **Approval of Board Meeting Minutes**

The Board members were asked to review and approve the draft minutes from the following meetings.

- A. *October 22, 2010 Meeting*
- B. *January 11, 2011 Meeting*
- C. *April 11, 2011 Meeting*

4. **Director's Report**

On behalf of the Director, Executive Officer, Mona Maggio provided an overview of the Department's current travel restrictions.

5. **Executive Officer's Report**

Executive Officer, Mona Maggio reported on the following:

A. *Budget Update*

Ms. Maggio provided a breakdown of the budget. The Board's budget authority for the 2010/2011 fiscal year is \$1,651,385. As of May 31, 2011 Board expenditures total \$1,254,041 which reflects 76% of the Board's total budget. Regarding expenditures to date, the Board has spent 52% on personnel services and 18% on Attorney General and Office of Administrative Hearing expenses. The remaining expenses are attributed to operating expenses, equipment and examination development.

The Board's fund condition reflects for current year an 8.7 month reserve balance. The reserve is project to drop to 1.1 month reserve next fiscal year (Governor's Budget) due to the loan to the General Fund in the amount of one million dollars. The loan will be shown in the fund condition.

Work on the 2011/2012 state budget began early 2011. To date, a final agreement on the state budget has not materialized. In the event a budget agreement is not in place by July 1, 2011, The Board is prohibited from spending any money from its \$1,577,000 budget. So that the Board's core functions are not affected by a potential delay in reaching a budget agreement, Board staff has been making the necessary preparations to ensure minimal impact to our programs.

B. Board Operations

2011 Board Meeting Dates

The upcoming 2011 Board Meeting dates are as follows:

- August/September 2011 at Department of Consumer Affairs (DCA) in Sacramento, CA
- November 4, 2011 in Northern California (most likely in Oakland or San Francisco).

Board Members

There are currently three professional member vacancies and four members are serving in their grace periods.

Board Member, Donna Burke was reappointed to the Board by Senator Darrell Steinberg, Senate Rules Committee. Her term will expire on June 1, 2015. Ms. Maggio congratulated Ms. Burke on her reappointment.

Personnel

The Board staff is comprised of 13.5 positions – ten full time staff, one half-time staff and one seasonal clerk. The Board has two vacancies, one full time management services technician and one half-time associate governmental program analyst (AGPA), which is a limited term position that was obtained through the Department of Consumer Affairs Protection Initiative (CPEI). Once

the 2011/2012 budget is signed and in effect, the Board will be able to hire a staff services manager (SSMI) to provide a first level of supervision. Staff is also seeking to establish an AGPA position in its Enforcement Program and to make the limited term office position permanent.

Office Relocation

We have received the construction plan from the Project Manager, Ken Brown, DCA. The actual move is scheduled to begin July 27th (tearing down cubicals and moving files), with our first day up and running in the new office to be August 3rd. During the transition period, staff will be temporarily housed within the Bureau of Security and Investigative Services (BSIS).

Website

The following additions/updates were made to the Board's website since the last Board Meeting:

- Continuing Education Regulation Updated - Effective June 17, 2011
- Reminder: Glaucoma Certified (TPG or TLG) Optometrists are required to Complete 10 Continuing Education (CE) Hours in Glaucoma Specific Education – Effective January 8, 2011
- Frequently Asked Questions – New Fingerprinting Requirements for Optometrists Licensed Prior to April 1, 2007
- Frequently Asked Questions About Glaucoma Certification
- Reformatted Meetings Page

Licensing Program

This is the peak season for evaluating optometrist applications and issuing licenses to new optometrists. The National Board of Examiners in Optometry (NBEO) released the candidate scores on June 14, 2011 and staff expects to receive the scores at the Board within a week. Because applicants are now required to submit an application for optometric licensure to become eligible to sit for the California Laws and Regulations Examination, the Board receives applications on an on-going basis versus prior years when applications were received primarily in April and May. This has provided an opportunity for staff to evaluate the applications as they are received and communicate with applicants on deficiencies and how to remedy them. In most cases, once the NBEO scores are received, the licenses will be issued within a day or two.

Health Resources and Services Administration – Data Bank

On June 14, 2011, Cheree Kimball, Dillon Christensen, and Ms. Maggio participated in a webinar sponsored by the U.S. Department of Health and Human Services, Health Resources and Services Administration Bureau of Health Professions, Division of Practitioner Data Banks. The purpose of the webinar was to discuss the upcoming audit of data bank compliance activities for chiropractic, optometric, and physical therapy licensing authorities. The Board will be participating in the review of compliance for the years 2006 – 2009. A Report of the audit's findings and recommendations will be reported at a future meeting.

Dr. Goldstein opened the floor to questions from Board members.

Dr. Kenneth Lawenda inquired if there have been any decisions regarding the American Board of Optometry (ABO) certification. Ms. Maggio replied there have not been any decisions. Dr. Goldstein suggested that this matter be discussed under Agenda Item 10.

Board Secretary, Monica Johnson noted that this is the first board meeting without former enforcement manager, Margie McGavin. She suggested that this would be a good time to recognize her service to the Board. Dr. Goldstein noted Ms. McGavin's wonderful job of updating members of enforcement matters.

Additionally, former Board member, Dr. Susy Yu was recognized for her service to the Board. Board members and staff discussed possible ways of providing appreciation for board members and staff members upon separation.

6. Petition for Reduction of Penalty and Early Termination of Probation

Administrative Law Judge (ALJ), Daniel Juarez presided over the hearings. Board members heard the following petitions:

- A. Dr. David Muris, O.D., License Number OPT 5059
Agency Case Number: CC 2006-96
- B. Dr. Casey Finn, O.D., License Number OPT 8638
Agency Case Number: CC 2005-104
- C. Dr. Gregory Tom, O.D., License Number OPT 10427
Agency Case Number: CC 2003-125
- D. Dr. Sharon Samski, O.D., License Number OPT 9531

Dr. Sharon Samski filed a Petition for Reduction of Penalty and Early Termination of Probation. However a Petition to Revoke Probation was filed by the Board on May 23, 2011. The Petition is currently pending at the Office of the Attorney General. In a letter dated June 4, 2011, Dr. Samski withdrew her Petition.

- E. Dr. Richard Martin, O.D., License Number OPT 8799
Agency Case Number: CC 2007-71

FULL BOARD CLOSED SESSION

7. Pursuant to Government code Section 11126(c)(3), to Deliberate on Petitions for Reduction of Penalty and Early Termination of Probation

The Board convened to close session to deliberate on the following disciplinary decisions:

- A. Dr. David Muris, O.D., License Number OPT 5059
- B. Dr. Casey Finn, O.D., License Number OPT 8638
- C. Dr. Gregory Tom, O.D., License Number OPT 10427
- D. Dr. Sharon Samski, O.D., License Number OPT 9531
- E. Dr. Richard Martin, O.D., License Number OPT 8799

8. Pursuant to Government Code Section 11126(c)(3), to Deliberate on Disciplinary Matters

The Board deliberated on the following disciplinary matters:

- A. Proposed Decision and Disciplinary Order, Elise A. Millie, O.D., License Number OPT 13430
- B. Revised Stipulated Settlement and Disciplinary Order, Brent Lee Gibson, OPT 10198
- C. Stipulated Surrender of License and Disciplinary Order, Christine Ann Matson, O.D., OPT 7990

9. Pursuant to Government Code Section 11126(e)(1) the Board Will Confer With Legal Counsel to Discuss Pending Litigation: California Academy of Eye Physicians & Surgeons, and California Medical Association v. State Board of Optometry, Case Number CGC-11-507241, San Francisco Superior Court

FULL BOARD OPEN SESSION

10. Discussion and Possible Approval to Allow the Glaucoma Certification Case Management Course and Grand Rounds Program to Serve as Continuing Education Credit as Required in California Code of Regulations Section 1536

Lead Licensing Analyst, Jeff Robinson provided an overview of the background and action requested of the Board.

California State Board of Optometry staff has received inquiries as to whether or not licensees seeking glaucoma certification could receive continuing optometric education (CE) credit for the completion of a Case Management course and/or Grand Rounds Program offered by California schools/colleges of optometry.

Since it appears that the Case Management Courses and Grand Rounds Programs offered by the California schools/colleges of optometry meet the requirements listed in California Code of Regulations (CCR) Section 1536, it is the opinion of Board staff that licensees who complete either of the courses should be granted CE credit.

One of the California Optometry schools, Western University of Health Sciences School of Optometry, has not received its full accreditation yet. Therefore, the CE courses they provide do not meet the provisions of CCR 1536(e)(1). Board staff is uncertain as to how their courses should be handled.

Board staff is requesting that Board members:

- review the current procedures when granting CE credit for optometrists seeking Therapeutic Pharmaceutical Agent (TPA) certification, lacrimal irrigation and dilation certification, and glaucoma certification
- Discuss the possible approval of glaucoma certification Case Management Course and/or Grand Rounds Program for CE credit and,
- Discuss whether prior approval of the glaucoma certification course provided by the California schools/colleges is sufficient, or should Western be required to submit a "Request for Approval of Continuing Optometric Education Course(s)" along with the required information and fee?

Alex Arredondo moved to approve the glaucoma certification Case Management Course and/or Grand Rounds Program for CE credit. Donna Burke seconded. The Board voted unanimously (7 – 0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Dr. Lawenda	X		
Mr. Naranjo	X		
Ms. Burke	X		
Mr. Kim	x		

Donna Burke moved to have Western University of Health Sciences School of Optometry formally apply until fully accredited, and to have the courses approved by Jeff Robinson. Monica Johnson seconded. The Board voted unanimously (7 – 0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Dr. Lawenda	X		
Mr. Naranjo	X		
Ms. Burke	X		
Mr. Kim	x		

11. Discussion and Possible Action on Assembly Bill (AB) 778, Health Care Service Plans: Vision Care

Ms. Leiva provided an overview of AB 778.

Business and Professions Codes (BPC) section 655 prohibits business relationships between optometrists and opticians. Business relationships include:

- Membership;
- Proprietary Interest;
- Co-ownership;
- Landlord/tenant relationships; and
- Any profit-sharing arrangement in any form, directly or indirectly which includes:
 - (1) Stock Ownership;
 - (2) Interlocking directors;
 - (3) Trusteeship;
 - (4) Mortgage;
 - (5) Trust deed; and
 - (6) Manufacture, sale, or distribution to optometrists of optical products or anything related.

AB 778 proposes to allow registered dispensing opticians, and optical company, a manufacturer or distributor of optical goods, or a non-optometric corporation to do the following:

- Own a health care services plan that provides vision care services and shares profits;
- Contract for business services with, lease office space or equipment to for from, or share office space with, a health care service plan that provides vision care services; and
- Jointly advertise vision care services with a health care service plan that provides vision care services.

Board staff advised that there are two main issues that are of concern regarding the co-location of opticians and optometrists:

BPC sections 655 and 2556 are designed to protect consumers, have been part of California law for 90 years. The optical companies are interpreting provisions in the Knox-Keene Act (Health & Safety Code section 1395(b) specifically) as “relieving specialized health care service plans of restrictions on employing doctors, optometrists, and other health care professionals by providing in section 1395(b) that plans licensed under the Knox-Keene Act shall not be deemed to be engaged in the practice of a profession and may employ, or contract with, any professional to deliver services.” According to the California Attorney General, this is not so. Knox-Keene specialized health care service plans must still comply with BPC sections 655 and 2556.

LensCrafters and Pearl Vision are also engaging in conduct designed to influence and interfere with the clinical decisions of their optometrists.

Staff is requesting the Board discuss this bill and approve staff’s suggested letter of opposition, which was already sent to Senate B&P consultant in order to meet the deadline for analysis. Prior to the start of the discussion, Board Member Dr. Ken Lawenda recused himself from the matter due to a potential/perceived conflict of interest. Dr. Lawenda is currently employed by Luxottica as a consultant.

Ms. Sherry Ledakis, Deputy Attorney General gave a synopsis of the litigation involving Luxottica's subsidiaries.

Litigation commenced in February, 2002, with the filing of *People v. Cole, Pearle Vision*, by the California Office of the Attorney General alleging unfair competition and illegal advertising under Business and Professions Code sections 17200 and 17500 against Cole and its subsidiaries, Pearl Vision, Inc. and Pearl Vision Care, etc.. The optical companies were alleged to be operating their California optical stores in violation of BPC sections 655 and 2556.

Only July 5, 2002, the optical industry responded to the Attorney General's enforcement action against Pearle Vision by filing its own action filed in federal court to have the Code sections declared unconstitutional. The allegation was that the challenged Code sections favored in-state optometrists, who could legally examine patients and also dispense eyewear in the same location, and disfavored out-of-state optical chains who could not legally offer eye exams in the same location where they sell eyewear.

For more than five years, Pearle Vision was prosecuted in the state courts while LensCrafters was simultaneously defended in the federal courts.

Early in *Pearle Vision*, the San Diego Superior Court issued a preliminary injunction against Cole and its subsidiaries to prohibit their "co-location" business practice, where they maintained optometrists on their dispensing premises and advertised eye exams through the HMO owned by Cole, known as Pearle VisionCare. Cole appealed - eventually to the California Supreme Court - and on June 12, 2006, the California Supreme Court held in favor of the People and against Cole and its subsidiaries.

On December 6, 2006, cross-motions for summary judgment were decided in favor of plaintiffs in *LensCrafters*, holding that BPC sections 655 and 2556 are unconstitutional, in that they violate the Commerce Clause of the U.S. Constitution. The Attorney General and the Director of DCA appealed to the Ninth Circuit Court of Appeals.

While the appeal was pending before the Ninth Circuit in *LensCrafters*, on July 18, 2007, in the *Pearle Vision* enforcement action, the State of California and Cole National, entered into a "Stipulation for Entry of Final Judgment and Permanent Injunction."

In that stipulation, the parties agreed in part that causes of action for violations of BPC sections 655 and 2556 would be dismissed without prejudice, meaning that the State was not prohibited from bringing an action for violation of those sections against Cole in the future.

The stipulation also provided that Cole and its subsidiaries would pay \$2.5 million to the Attorney General for costs and attorneys' fees incurred in prosecuting the action and would be enjoined from further violations of the law. Furthermore, the stipulation and judgment provided that for a six month period following final adjudication of the federal *LensCrafters* case, the Attorney General would not file any new case against Cole, based upon the Code sections that had been constitutionally challenged in *LensCrafters*, namely BPC 655 and 2556.

On May 29, 2009, in *LensCrafters*, the Ninth Circuit reversed, holding that the trial court had erred in evaluating the constitutional challenge using the "strict scrutiny" standard, and remanded the matter back to the Judge for evaluation of plaintiffs' claim under the correct standard.

The Ninth Circuit instructed the trial court to apply the "Pike balancing test," which requires balancing the benefits of BPC sections 655 and 2556 against the degree they burden interstate commerce. On April 28, 2010, the trial court applied the Pike balancing test and concluded that the burden on interstate commerce of the challenged laws is only minimal, if any, which does not

outweigh the benefit of the laws. Accordingly, applying the correct Pike balancing standard, this time the court issued judgment in favor of the State of California, finding that the laws are constitutional.

LensCrafters, has appealed the Judge's most recent decision to the Ninth Circuit Court of Appeals where briefing has been completed and the parties await scheduling of oral argument.

Mr. Wallace W. Lovejoy, a representative for Luxottica, addressed their concerns regarding the Board's action and memo regarding AB 778. They explained that the memo had fundamental misstatement and inaccuracies that would unduly interfere with full and accurate consideration of AB 778 and the benefits it could offer to the public.

Mr. Lovejoy outlined the four misimpressions that the memo invites as follows:

1. It is Not Accurate to Say Optical Companies Have Been Violating the Law

No court has ever found LensCrafters or Pearle Vision to be in violation of sections 655 and 2556. To the contrary, it is the confusion that these existing laws have created with respect to the co-location of vision services Knox-Keene plans with optical companies that prompted AB 778 in the first place. Since 1986, numerous optical companies, such as LensCrafters, Pearle Vision, Sterling Optical and Site for Sore Eyes, have associated with Knox-Keene health care service plans which employ or contract with optometrists. The memo suggests that these optical companies intentionally violated the law when they co-located with affiliated Knox-Keene plans. This is not true. Numerous California agencies during the same time period, including the Department of Managed Healthcare (DMHC), the Department of Corporation, the Medical Board, and the Board of Optometry viewed these arrangements as lawful. Not only have these state agencies known about such relationships, they have continued to license, register and renew these businesses with these co-location arrangements for over 20 years. AB 778 seeks to clarify law so that consumer can continue to be served with a variety of options for optical care. It does not, as the memo suggests, seek to continue to foster unlawful conduct.

2) No Court, Nor the Attorney General, Has Made the "Findings" Referenced in the Memo

The "findings" in the memo supporting the argument that co-location permitted by AB 778 will be harmful to consumers are not "findings" at all nor contain "undisputed" facts. The "findings" are taken from a document submitted by the Attorney General in the NAOO v. Harris action purporting to set forth "undisputed facts." The Attorney General did not conduct a study or investigation to develop such "findings." After reviewing all the evidence, the trial court repeatedly held that there was "no evidence" in the record of any harm to consumers when optical stores are permitted to co-locate with optometrists employed by Knox-Keene plans. The "findings" in the memo cannot be considered accurate or complete statements of facts.

For example:

- Government officials in California testified that the quality of care was not lessened when optometrists co-locate with optical chains under the Knox-Keene model.
- The California Department of Consumer Affairs (DCA) likewise found in a 1982 report that there is "no evidence that examination quality is worse when optometrists are corporate employees..." The DCA recommended eliminating the laws that are challenged in the NAOO action, concluding that "in sum, the web of corporate practice regulations works unevenly and inconsistently; rests on premises which are unproven, demonstrably false, or are contradicted by evidence of how corporation operate in fields other than optometry; avoids known consumer abuses; and operate effectively in only one consistent way – stifling competition." It was on the basis of this evidence that the trial court repeatedly concluded that "there is no evidence that the quality of eye care varies by practice setting."

- The statement in the memo that optical chains “get away with providing lower quality eye exams, and high priced eyewear” because patients “are not knowledgeable enough” to know whether they received a quality eye exam. The independent, unbiased government agencies studying this issue determined that consumers do not receive lower quality exam in the co-located model.
- The memo describes purported practices that allegedly interfered with the ability of optometrists to exercise their professional judgment. These assertions were contested and rejected by the trial court when it determined that there is “no evidence which links the complained practiced to actual harm to the public’s health.”

3) The Memo Contains Numerous Factual Inaccuracies About Optical Companies and the Impact They and AB 778 Will Have on the State of California

- The memo asserts that a co-location model requires quotas and financial incentives. These assertions are made based on years old allegations by the Attorney General’s office. AB 778 specifically addresses and ensures that conduct such as quotas and financial incentives are prohibited.
- The multiple suggestions in the memo that AB 778 will result in job losses is incorrect. AB 778 preserves the status quo.
- The memo’s representation of LensCrafters’ operation in Canada is incorrect. Under the laws of all ten provinces in Canada, an optical store is permitted to sublease space directly to an optometrist – a manner of co-location prohibited by California.

4) AB 778 Benefits Consumers and Optometrists

AB 778 seeks to preserve the co-location model under which quality eye care and eyewear have been offered to California consumers for the last 25 years. The co-location model employs and contracts with hundred of doctors and associates that are providing quality eye care to thousands of patients.

The convenience of the co-location model has made optometry services accessible to millions. The flexibility of practicing in an HMO setting is not unique to optometry and has become an attractive choice to many doctors and medical practitioners across disciplines. AB 778 protects this increasingly attractive employment option for optometrists while further protecting a doctor from financial influence by the eyewear company in a co-located setting. Healthcare in California has changed significantly over the past 30 years, and AB 778 reflects those changes.

Mr. Lovejoy explained further that Luxxotica is sensitive to the concerns of the Board related to the relationship of the doctor to the retail location. He shared proposed amendments to AB 778 which include:

- Prevent quotas that require a doctor to see a certain number of patients.
- Prevent any financial relationships between retail and the doctor.
- Continue to protect patient records.
- Increase communication between the DMHC and the Board of Optometry.

He requested that the Board rescind its letter of opposition to the legislature, especially since their decision was based on incorrect information.

The Board Members discussed AB 778 and its impact to consumers and optometrists. All members were in support of Board staff’s actions pertaining to the legislation, and maintained a position of opposition.

Donna Burke moved to accept staff’s action so far. Alex Arredondo seconded. The Board voted unanimously (6 – 0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Dr. Lawenda			Did not participate in this vote. He recused himself due to a perceived or potential conflict with this bill.
Mr. Naranjo	X		
Ms. Burke	X		
Mr. Kim	x		

12. Public Comment for Items Not on the Agenda

13. Suggestions for Future Agenda items

Board member, Fred Naranjo suggested having webinars at the optometry schools for the senior classes. Board members and staff discussed when webinars may begin.

Ms. Johnson requested that scheduling be done at this time. The tentative meeting date decided upon is September 13, 2011.

Dr. Arredondo requested a future discussion on Latisse.

Board member, Donna Burke asked what is currently being done to make the public aware that the Board exists and that there is a website they can go to for information.

Policy Analyst, Andrea Leiva replied that the Department has various publications that are distributed annually (i.e. consumer guide with all of the various boards and contact information). Additionally the Department distributes flyers at outreach events.

Ms. Johnson inquired if the Board can have a Facebook page.

Board member, Alexander Kim noted that he concurs that public outreach is very important. He stated that he has participated in multiple events, free eye exams were given, and they were a great networking resource.

Dr. Goldstein suggested that Mr. Kim and Ms. Burke become a Public Relations Committee. Board and staff members all agreed. Ms. Maggio will facilitate the set-up of this committee

14. Adjournment

Donna Burke moved to adjourn the meeting. Ken Lawenda seconded. The Board voted unanimously (7 – 0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Dr. Lawenda	X		
Mr. Naranjo	X		
Ms. Burke	X		
Mr. Kim	X		

The meeting was adjourned at 5:00 p.m.

Monica Johnson, Board Secretary

Date